

SUPERVISORY NOTICE -- application for a direction to suspend effect of Notice until reference disposed of – Notice varied a Part IV permission by removal of all regulated activities with immediate effect -- reason for Notice being breach of threshold conditions and Principles 1 (conducting business with integrity); 6 (treating customers fairly); and 11 (dealing with FSA in an open and co-operative way) -- in his applications for permission to conduct regulated activities the Applicant had failed to disclose that he had been erased from the Register of Practising Insurance Brokers in 1993; that he had been expelled from membership of the Personal Investment Authority in 1997; and that the Financial Ombudsman Service had expressed the preliminary view in 2003 that advice to a client about pension arrangements had not been suitable and that the Applicant should pay redress if there had been any loss – whether Tribunal satisfied that a direction to suspend the effect of the Notice would not prejudice the interests of consumers – no – whether necessary for notice to take effect immediately - yes – whether removal of all regulated activities proportionate to the concerns being addressed by the Notice – yes – application dismissed – Financial Services and Markets Tribunal Rules 2001 SI 2001 No. 2476; Rule 10(1)(e) and 10(6)

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

VIRENDA RAI AGARWALA
Trading as
ABBEX INSURANCE

Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal : DR A N BRICE
MR T C CARTER

REASONS FOR DIRECTION

Sitting in London on 20 December 2006

Gareth Fatchett, of Financial Services Legal LLP, for the Applicant

Daniel Thornton, of the Financial Services Authority, for the Respondent

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REASONS FOR DIRECTION

The application

1. On 1 November 2006 the Financial Services Authority (the Authority) issued to Mr Virendra Rai Agarwala, trading as Abbex Insurance (the Applicant), a First Supervisory Notice (the Notice) which varied the Applicant's Part IV permission by removing all regulated activities with immediate effect. The reasons for the action taken by the Authority were that the Applicant had failed to satisfy the threshold conditions set out in Schedule 6 to the Financial Services and Markets Act 2000 (the 2000 Act) because the Authority was not satisfied that the Applicant was a fit and proper person having regard to all the circumstances. The Applicant had failed to conduct his business with integrity within the meaning of Principle 1; had failed to pay due regard to the interests of his customers and to treat them fairly within the meaning of Principle 6; and had failed to meet the requirements of Principle 11 under which firms are required to co-operate with the Authority.

2. On 28 November 2006 the Applicant referred the Notice to the Tribunal and, at the same time, applied for a Direction under Rule 10(1)(e) of the Financial Services and Markets Tribunal Rules 2001 SI 2001 No. 2476 (the Rules) suspending the effect of the Notice until the reference had been finally disposed of. The application was heard on 20 December 2006 and a Direction was released the following day dismissing the application. The Direction stated that reasons would follow and this document contains the reasons for the Direction. The Directions released on 21 December 2006 also set out a timetable leading to the speedy hearing of the substantive reference. The date fixed for the hearing is 5 February 2007.

The Rules

3. Rule 10(1) of the Rules describes particular types of direction which may be given by the Tribunal and rule 10(1)(e) provides that a Direction given by the Tribunal may:

"(e) suspend the effect of an Authority notice (or prevent it taking effect) until the reference has been finally disposed of, or until any appeal against the Tribunal's determination of the reference has been finally disposed of, or both"

4. Rule 10(6) provides:

"Where an application for a direction is made under paragraph (1)(e), the Tribunal may give such a direction only if it is satisfied that to do so would not prejudice -

- (a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by the Authority notice; or**
- (b) the smooth operation or integrity of any market intended to be protected by that notice."**

The statutory framework

5. The following statutory framework is relevant to the facts of the application.

6. Part I (sections 1 to 18) of the Financial Services and Markets Act 2000 (the 2000 Act) contains the provisions about the Authority as Regulator. Section 2(1) provides that, in discharging its general functions, the Authority must, so far as is reasonably possible,

act in a way which is compatible with the regulatory objectives. Section 2(2) provides that one of the regulatory objectives is the protection of consumers.

7. Part IV (sections 40 to 55) contains the provisions relating to permission to carry on regulated activities and section 42(2) provides that the Authority may give permission for an applicant to carry on specified activities. Section 41(2) provides that, in giving or varying permission, the Authority must ensure that the person concerned will satisfy, and continue to satisfy, the threshold conditions in relation to all the regulated activities for which he has, or will have, permission. Section 41(1) provides that the threshold conditions are those set out in Schedule 6. Schedule 6 now describes six threshold conditions. Paragraph 5 of Schedule 6 is headed "Suitability" and provides:

- "5. The person concerned must satisfy the Authority that he is a fit and proper person having regard to all the circumstances, including-**
- (a) his connection with any person;**
 - (b) the nature of any regulated activity that he carries on or seeks to carry on;**
 - and**
 - (c) the need to ensure that his affairs are conducted soundly and prudently."**

8. Section 138 of the 2000 Act provides that the Authority may make such rules applying to authorized persons as appear to it to be necessary or expedient for the purpose of protecting the interests of consumers Under that provision the Authority has issued "Principles for Businesses" (PRIN). Principles 1, 6 and 11 are:

"1 A firm must conduct its business with integrity.

6. A firm must pay due regard to the interests of its customers and treat them fairly.

11 A firm must deal with its regulators in an open and co-operative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice."

9. Section 44 of the 2000 Act provides that the Authority may, on the application of an authorised person, vary a Part IV permission in a number of ways, including removing a regulated activity. Section 45(2) gives the Authority power on its own initiative to vary a Part IV permission in any of the ways mentioned in section 44 and section 45(1) provides:

"45(1) The Authority may exercise its power under this section in relation to an authorised person if it appears to it that:

- (a) he is failing, or is likely to fail, to satisfy the threshold conditions; ... or**
- (c) it is desirable to exercise that power in order to protect the interests of consumers or potential consumers."**

10 Section 53 contains the provision about the procedure for the exercise of the Authority's own-initiative power to vary a Part IV permission. It provides that a variation either takes effect immediately or on such a date as may be specified in the notice. Section 53(3) provides:

"53(3) A variation may be expressed to take effect immediately (or on a specified date) only if the Authority, having regard to the ground on which it is exercising its own initiative

power, reasonably considers that it is necessary for the variation to take effect immediately (or on that date)."

11. Finally, section ENF 3.5.2G(2) of the FSA Handbook provides that a restriction imposed on a firm "should be proportionate to the objectives the FSA is seeking to achieve". Section ENF 3.5.13G(9) provides:

"The FSA will take into account the (sometimes significant) impact that a variation of permission may have on a firm's business and on its customers' interests, including the effect of variation on the firm's reputation and on market confidence. The FSA will need to be satisfied that the impact of any use of the own-initiative power is likely to be proportionate to the concerns being addressed in the context of the overall aim of achieving its regulatory objectives."

The issues

12. The main question which we have to determine is whether we are satisfied that the suspension of the Notice would not prejudice the interests of any persons (whether consumers, investors or otherwise) intended to be protected by the Authority notice within the meaning of Rule 10(6)(a). We should also be satisfied that it was necessary for the Notice to take effect immediately within the meaning of section 53(3) of the 2000 Act and that the removal of all the Applicant's Part IV permissions with immediate effect was proportionate within the meaning of ENF 3.5.2G(2).

The evidence

13. A bundle of documents was produced by the Authority. We also heard oral evidence from the Applicant.

The facts

14. The Applicant is a sole trader insurance intermediary. He is not permitted to hold client money or assets.

1993 - Erasure from the register of the Insurance Brokers Registration Council

15. On 6 September 1993 the Applicant, practising as Abbex Insurance Brokers, was erased from the Register of Practising Insurance Brokers by the Insurance Brokers Registration Council at the direction of its Disciplinary Committee. The reasons for the erasure were stated to be "Under section 15(2) of the Act for breaches of the rules under section 11". "The Act" was The Insurance Brokers (Registration) Act 1977, now repealed. Section 11 provided that the Council should make rules requiring registered insurance brokers to ensure that their businesses had adequate working capital; that the value of their business assets exceeded their business liabilities; and that they were not unduly dependent on any particular insurance company. The Council was also to make rules requiring practicing insurance brokers to keep accounts at banks; to keep accounting records; and to submit balance sheets and profit and loss accounts to the Council at prescribed intervals. Section 15(2) provided that, if it appeared to the Disciplinary Committee that a registered insurance broker had failed to comply with any rules under section 11, and that the failure was such as to render the insurance broker unfit to have its name on the register, the Disciplinary Committee might, if they thought fit, direct that the name of the insurance broker should be erased from the register.

1996 – The Personal Investment Authority

16. On 11 December 1995 the Applicant had a monitoring visit from the Personal Investment Authority. A copy of the monitoring visit report was sent to the Applicant on 27 March 1996. The report identified a number of rule breaches, including a failure to keep sufficient, accurate and up to date records (particularly of investment business, recruitment and training, complaints and financial records) to demonstrate compliance with the Rules of the Personal Investment Authority. The Applicant was requested to effect the remedial action identified in the report and to provide the Personal Investment Authority with brief monthly progress reports.

17. On 15 November 1996 the Personal Investment Authority issued an intervention notice to the Applicant trading as Abbex Insurance. The notice stated that it appeared to the Disciplinary Committee (of the Personal Investment Authority) that the Applicant might not be a fit and proper person to carry on investment business because he had failed to comply with the deadline imposed by the monitoring visit report to carry out remedial action and to provide monthly progress reports; had failed to respond to a number of letters from the Personal Investment Authority; had failed to supply quarterly returns required for the purposes of the pensions review; and had failed to pay administrative surcharges levied because of these failures.

18. The intervention notice of 15 November 1996 prohibited the Applicant from conducting any investment business; from soliciting investment business; and from disposing or dealing with any of his assets. The prohibition took immediate effect.

19. Also on 15 November 1996 the Personal Investment Authority initiated formal disciplinary proceedings to revoke the Applicant's authorization. The Personal Investment Authority's Disciplinary Committee decided to expel the Applicant. On 29 January 1997 the Applicant referred the matter to the Personal Investment Authority Membership and Disciplinary Tribunal. Before the matter was heard by the Tribunal the Applicant withdrew his appeal and admitted the charges set out in the notice of charges and the matters set out in the statement of case. The disciplinary proceedings were settled on the basis that the Applicant was expelled from membership of the Personal Investment Authority.

20. Accordingly, on 30 July 1997 the Disciplinary Committee of the Personal Investment Authority issued an Order that the Applicant was expelled from membership of the Personal Investment Authority. That meant that the Applicant was no longer authorized to give investment advice.

21. After his expulsion from membership of the Personal Investment Authority the Applicant practiced as a general insurance broker for which authorization was not required until January 2005.

2003 - The Financial Ombudsman Service

22. On 24 February 2003 a client of the Applicant complained to the Financial Ombudsman Service that in April 1989 she had been inappropriately advised by the Applicant in respect of her pension. On 30 September 2003 the Financial Ombudsman Service wrote to the Applicant with a reasoned preliminary view that the advice to the

client to opt out of a pension scheme in favour of effecting personal pension arrangements was not a suitable transaction and that the Applicant should establish whether the client suffered a loss, and, if so, pay redress. The most preferable method of redress would be to re-instate the client's pension benefits in her company pension scheme by paying the current costs of restoring the lost service.

2004 – the applications to the Authority

23. On 12 July 2004 the Applicant applied to the Authority for authorization in respect of general insurance business. He signed and submitted two forms, a High Street Firms application form and a controlled function and individual controllers form.

July 2004 - The High Street Firms application form

24. The High Street Firms application form contained a section D – Disclosure which contained questions 32 to 40. Section D started with the paragraph:

“The firm must provide details of any significant events that have occurred in the past that may be relevant to our assessment. We will consider each event in relation to the regulated activities for which the firm will have permission bearing in mind our regulatory objectives in the Act. If the firm is unsure as to whether an event needs to be disclosed, we advise that it discloses it and we can then consider its importance.”

25. Questions 35, 39 and 40 of the High Street Firms application form, and the Applicant's answers, were:

“35 Has the firm been a defendant in any criminal or civil proceedings or arbitration in the last 5 years or is any *unsatisfied* judgment debt *or award* outstanding against it?

No

39 Has the firm ever been refused, had revoked, any licence, membership, authorization, registration, application or any other permission granted by a financial services regulator in the UK or overseas?

No

40. Are there any other significant events regarding the firm or any companies in the firms group that might adversely affect the application?

No.”

26. Section K of the High Street Firms application form contained the following declarations;

“I confirm that the information contained in this application is accurate and complete to the best of my knowledge and belief and that I have taken all reasonable steps to ensure that this is the case.

I am aware that it is a criminal offence knowingly or recklessly to give the FSA information that is false or misleading in a material particular.

I will notify the FSA immediately if there is a change to the information given ... If I fail to do so, this may result in a delay in the application process or to enforcement action.”

The controlled functions and individual controller form

27. Questions 34, 37(b) and 38(a) to (c) of the controlled functions and individual controller form, and the Applicant’s answers, were;

“34. Does the individual have any outstanding financial obligations arising from regulated activities, which the individual has conducted in the past, whether in the United Kingdom or overseas?

No

37(b) Has the individual ever, either in the United Kingdom or elsewhere, been refused, restricted in, or had suspended, the right to carry on any trade, business or profession for which specific licence, authorization, registration, membership or other permission is required?

No.

38. In respect of activities regulated by the FSA or any other regulatory body [including the PIA and the Institute of Insurance Brokers Regulatory Council which was the successor to the Insurance Brokers Registration Council] has the individual ... ever:

(a) been refused, had revoked, restricted or terminated any licence, authorization, registration, notification, or other permission granted by any such body?

No

(b) been criticized, censured, disciplined, suspended, expelled, fined, or been the subject of any other disciplinary or intervention action by any such body?

No

(c) resigned whilst under investigation by, or been required to resign from, any such body?

No”

28. Section E of the controlled functions and individual controller form contained the following information and declaration:

“Knowingly or recklessly giving the FSA information which is false or misleading in a material particular is a criminal offence.

It should not be assumed that information is known to the FSA merely because it is in the public domain or has previously been disclosed to the FSA or to another regulatory body. If there is any doubt about the relevance of the information it should be included..

I confirm that the information in this form is accurate and compete to the best of my knowledge and belief and that I have read the notes to this form.”

December 2004 – The final decision of the Financial Ombudsman Service

29. On 15 December 2004 the Financial Ombudsman Service issued a final decision in respect of the complaint of the client who had been advised to opt out of a final salary occupational pensions scheme and to effect personal pension arrangements instead. The complaint was upheld and the Applicant was ordered to carry out a loss assessment in accordance with the pension review guidance. If loss was established the Applicant was directed to pay to the trustees of the pension scheme the current amount needed to make good the shortfall in respect of the period in which the client remained opted out as a result of advice from the Applicant.

30. On 5 January 2005 the Financial Ombudsman Service wrote to the Applicant confirming that it had received from the client acceptance of the final decision which was therefore binding on the Applicant.

January 2005 – the authorisation

31. After receiving the Applicant’s applications of July 2004 the Authority discovered that the Applicant had been erased from the Register of Practising Insurance Brokers and so were also aware of the Applicant’s non-disclosure of this information in the application forms. This was not considered sufficiently material to prevent authorization.

32. Accordingly, on 14 January 2005 the Applicant was authorized by the Authority under Part IV of the 2000 Act to carry on the following regulated activities:

- (1) advising on investments (excluding pension transfers/opt outs), in respect of non-investment insurance contracts only;
- (2) agreeing to carry on a regulated activity;
- (3) arranging (bringing about) deals in investments, in respect of non-investment insurance contracts only;
- (4) assisting in the administration and performance of a contract of insurance, in respect of non-investment insurance contracts only;

(5) dealing in investments as agent, in respect of non-investment insurance contracts only;

(6) making arrangements with a view to transactions in investments, in respect of non-investment insurance contracts only.

2006 - The report of the Financial Ombudsman Service to the Authority

33. The Applicant did not comply with the final decision of the Financial Ombudsman Service dated 5 January 2005. On 22 December 2005 the Financial Ombudsman Service wrote to the Applicant to say that, unless documentary evidence was received showing that steps were being taken to address matters, then the failure to comply with the award would be reported to the Authority.

34. On 9 January 2006 the Applicant wrote to the pension scheme and asked to be informed of the reinstatement value for the missing years in respect of the client. However, the matter did not proceed. We understand that the pension scheme asked the applicant to pay a fee for the information he required which the applicant was reluctant to pay. On 5 June 2006 the Authority wrote to the Applicant requiring him to comply with the final decision of the Financial Ombudsman Service before 20 June 2006 failing which the matter would be referred to the Authority's Enforcement Division for action. On 17 July 2006 the Authority wrote to the Applicant saying that by failing to comply properly with the final decision of the Financial Ombudsman Service the Applicant was in breach of DISP 3.9.14(1)R and in breach of Principle 6 because he had failed to pay due regard to the interest of his customer and to treat the customer fairly. He had also failed to conduct his business with integrity. A recommendation would be made to the Regulatory Decisions Committee that the Applicant's Part IV permission to undertake regulatory activities should be cancelled.

35. On 27 July 2006 the Applicant's advisers wrote to the Authority and said that the firm that gave the advice to the pensions client was not the same firm as the Applicant. The firm that gave the advice had been regulated by the Personal Investment Authority and had been de-authorized in 1994. This was the first time that the Authority had been informed of the previous authorization. The Authority made enquiries and discovered the existence of the Personal Investment Authority intervention notice in 1996 and the expulsion in 1997.

36. On 1 November 2006 the Authority issued the Notice the subject of this reference. As well as varying the Applicant's Part IV permission by removing all regulated activities with immediate effect the notice provided that, within 14 days, the Applicant must notify in writing all clients for regulated activities that the Applicant was no longer permitted by the Authority to carry on regulated activities and must provide the Authority with a copy of the written notification and a list of all clients to whom it had been sent. At the date of the hearing this had not been done.

37. In evidence which we accept that Applicant told us that he had been in insurance for thirty-five years. In the earlier years he had a colleague, to whom he paid commission and who later became an employee, who undertook the independent financial advisory work including pensions advice. That employee left in or about the early 1990s.

The arguments for the Applicant

38. For the Applicant Mr Fatchett accepted that there had been problems in the past but argued that these had occurred when the Applicant had acted as an independent financial adviser. That had been before 30 July 1997 when the Applicant had been expelled from the Personal Investment Authority. The expulsion had not involved any matters of dishonesty. Mr Fatchett accepted that the replies to the questions on the application forms contained errors but argued that the answers were not intended to mislead. The Applicant had regarded his business as an independent financial adviser, which lasted until 1997, and his business as a general insurance broker, which lasted from 1997 to 2005, as two separate businesses and thought that he only had to disclose matters relating to his general insurance business. There had been no complaints about the Applicant relating to his general insurance business. There was no real, immediate risk to consumers.

39. Mr Fatchett went on to argue that the decision of the Financial Ombudsman Service was not given to the current business. It related to advice given in 1989 at a time when the Applicant's firm was acting as an independent financial adviser and was authorized by the Personal Investment Authority. Rule 1.9.4(d) of the Rules of the Personal Investment Authority provided that a person who had ceased to be a member had to co-operate fully with any adjudication or direction of the PIA Ombudsman but no adjudication had been given by the PIA Ombudsman. Also Rule 1.9.5(4) provided that the contract between an individual and the PIA ended 30 months after the name of an individual was removed from the register and the obligations of an individual continued for the duration of the contract. Mr Fatchett accepted that the final decision of the Financial Ombudsman Service was binding on the Applicant personally but argued that the Applicant was finding it difficult to comply with the decision as he did not have the necessary technical competence nor did he have the financial resources. The Applicant should have been referred to the Financial Services Compensation Scheme.

40. Finally, Mr Fatchett argued that the procedure adopted by the Authority did not comply with the convention in the Schedule to the Human Rights Act 1988 as the Applicant had been given no opportunity to make representations to an independent Tribunal. If the Notice was not suspended then the Applicant could not carry on his business and would have no resources to meet the final decision of the Financial Ombudsman Service.

The arguments for the Authority

41. For the Authority Mr Thornton argued that, in submitting both the High Street Firms application form and the controlled functions and individual controller form, the Applicant had failed to disclose that he had been erased from the Register of the Insurance Brokers Registration Council on 6 September 1993; that the Personal Investment Authority had issued an intervention notice on 15 November 1996 preventing the Applicant from conducting any investment business with immediate effect; and that his authorization had been revoked by the Personal Investment Authority on 30 July 1997. Although the non-disclosure of the Applicant's erasure from the Register of Practising Insurance Brokers was not considered sufficiently material to affect authorization, had the Authority known about the action of the Personal Investment

Authority then the Applicant would not have been authorized. The events leading to the Applicant's expulsion from the Personal Investment Authority were very serious as they amounted to non-co-operation with a regulator because they involved a failure to respond to remedial action which had been directed and a failure to respond to a pensions review. If the Applicant had not understood the forms then that cast doubt upon his basic competence to undertake regulated activities.

42. Mr Thornton also argued that the preliminary view of the Financial Ombudsman Service should have been mentioned in the answer to question 35 on the High Street Firms application form and disclosed as a significant event in the answer to question 40. The Applicant should also have disclosed the final decision of the Financial Ombudsman Service as soon as he became aware of it even though it occurred after he had sent the application forms. In the view of the Authority, the Financial Ombudsman Service had a key place in the financial regulatory system and it was essential for any regulated firm to comply with decisions of the Service. The complaint had been made to the Service in 2003 which meant that the Service had jurisdiction to deal with it and make a binding decision with which the Applicant was required to comply. It should not be difficult for the Applicant to comply with the final decision; the reinstatement value had been requested in 9 January 2006 and the liability of the Applicant could easily be calculated by deducting from the reinstatement value the value of the personal pension to be transferred into the scheme. If the Applicant could not pay then he should not continue in business.

Reasons for direction

43. The main question which we have to determine is whether we are satisfied that the suspension of the Notice would not prejudice the interests of any persons (whether consumers, investors or otherwise) intended to be protected by the Authority notice within the meaning of Rule 10(6)(a). In giving our reasons we confine ourselves to this matter and do not express any view on the other matters raised in argument by Mr Fatchett which will be determined at the substantive hearing of the reference.

44. For that reason we reach no decision about whether the Applicant intended to mislead the Authority by the incorrect replies on the application forms. That is a matter which the Applicant may wish to argue more fully at the substantive hearing. What is undisputed is that incorrect replies were made. In our view the lack of accuracy, for whatever reason, is a serious matter. A number of questions on the forms are in general terms and, for example, question 37(b) refers to the individual and not the firm and it would be a matter of concern if this were to be misinterpreted. Although the Applicant argued that he operated two separate firms, one before and one after 1997, the fact is that the Applicant has at all times been a sole trader and traded under the name of Abbex Insurance. The Applicant accepts that the final decision of the Financial Ombudsman Service is his own personal liability.

45. On the evidence and argument before us we have concluded that we are not satisfied that the suspension of the notice would not prejudice the interests of consumers. All insurance contracts require good faith on the part of the proposer in disclosing material information and the errors made in the two application forms are matters for serious concern. We also note that, although the final decision of the Financial

Ombudsman Service was given in January 2005, it has not yet been complied with. In our view consumers could be prejudiced if the notice were to be suspended and if the Applicant continued with his insurance business.

46. We are also satisfied that it was necessary for the Notice to take effect immediately and that the removal of all the Applicant's Part IV permissions with immediate effect was proportionate. On 20 December 2006 we directed that the substantive hearing should take place as soon as possible and it will take place on 5 February 2007.

47. We agree that that the procedures leading up to the issue of the First Supervisory Notice did not comply with the Human Rights Convention but this Tribunal is the independent and impartial tribunal required by Article 6 of the Convention and the Applicant has had the opportunity of being heard by the Tribunal.

48. This is a unanimous decision

DR A N BRICE

CHAIRMAN

RELEASE DATE:

FIN/2006/0018
15.01.07